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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CARMEN MORENO, Plaintiff and Respondent, v. GREENWOOD AUTO CENTER, Defendant and Appellant.	B138608 (Super. Ct. No. VC029238)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed.

Manning, Leaver, Brauder & Berberich and Christian J. Scali, for Defendant and Appellant.

Law Office of Lynn E. Moyer, Lynn E. Moyer, Law Office of Kent M. Bridwell, and Kent M. Bridwell, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, parts I, II, the heading for part III, the indicated portions of part III(E), and IV are certified for publication.

I. INTRODUCTION

Defendant, Greenwood Auto Center, appeals from portions of a judgment awarding damages and attorney fees to plaintiff, Carmen Moreno, in an action brought for fraud, conversion, and violation of the Vehicle Leasing Act (the act). (Civ. Code, § 2985.7 et seq.)[1] In the published portion of the opinion, we discuss whether prejudgment interest may be recovered in a conversion action where defendant was assessed damages for plaintiff's loss of use of her 1996 pickup truck and other financial losses. *No* damages were imposed for the value of the 1996 pickup truck at the time of the conversion. Given the express language in section 3287, subdivision (a), we conclude prejudgment interest can be recovered on the loss of use and other damages suffered by plaintiff.

II. BACKGROUND

The complaint was originally filed in former municipal court on June 5, 1997. Plaintiff filed an amended complaint on July 30, 1997. On April 28, 1999, on plaintiff's motion, the matter was transferred to the superior court for trial. In the first amended complaint, plaintiff sought: damages and attorney fees for alleged violation of the act (first cause of action); rescission of contract (second cause of action); and damages for fraud and deceit in connection with the conversion of her 1996 truck (third cause of action). The first amended complaint alleged that plaintiff spoke only Spanish and did not read, write, speak, or understand English. On April 4, 1997, plaintiff went to defendant's car dealership for the purpose of getting her 1996 truck serviced. While waiting in the service center, an "unknown agent" of defendant solicited plaintiff to trade in her 1996 truck for a new 1997 truck. Defendant's "unknown agent" told her that she would have payments that were similar to what she was already paying for the 1996 truck. She was paying approximately $350 a month for her 1996 truck.

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[1] All further statutory references are to the Civil Code unless otherwise indicated.

Plaintiff was then turned over to a Spanish-speaking "salesman" who showed her a 1997 truck. The salesman told her that the accessories she had on her 1996 truck, including a $1,500 camper shell and $2,500 custom wheels would be installed on the new 1997 truck. He also told her that with the new truck she would have similar payments and a great tax advantage by signing a "lease." The word "lease" was used in English. However, the Spanish translation of the word "lease," "arrendamiento," was not used. On April 4, 1997, plaintiff entered into a written lease agreement under which defendant leased to her a 1997 GMC 1500 pickup truck for a term of 60 months. Plaintiff, however, believed when the lease was presented to her that she was signing a sales contract. Plaintiff was not informed and did not understand that she would be paying for five years and then would have a residual payment of more than $12,000 due at the end of 60 months. Plaintiff also believed that the $12,000 figure was the amount that was being allowed as credit for the trade-in of her 1996 truck. It was alleged defendant also failed to disclose, among other things, the amount or method for determining her liability at the end of the lease term. It was further alleged that the truck was leased primarily for personal purposes, which made the transaction subject to the act. Defendant's actions violated the act which entitled plaintiff to statutory damages, rescission of contract, attorney fees, and costs.

In the second cause of action for rescission, restitution and attorney fees, plaintiff alleged that she had been damaged by transferring title and possession of the 1996 truck to defendant. The 1996 truck was valued at approximately $17,000 as a down payment on the lease agreement. The April 4, 1997, agreement was never "executed" due to defendant's inability to obtain financing for the lease. Defendant falsely represented that its inability to obtain the financing was due to plaintiff's misrepresentations regarding her employment. Plaintiff owned her own business. Defendant has refused numerous requests by plaintiff to return the trade-in 1996 truck to plaintiff or to make restitution of approximately $17,000 to plaintiff.

In the third cause of action, plaintiff alleged that defendant intentionally or negligently misrepresented that she "could trade in her 1996 truck on a 1997 truck" with no money down with approximately the same size monthly payment for a new 60-month

period. Defendant also represented that it would remove the custom features on the 1996 truck and put them on the 1997 GMC pick-up. Defendant's representations were false in that it induced plaintiff to sign a lease agreement with a residual buyout of $12,000, without revealing this fact to plaintiff. Defendant then attempted to induce plaintiff to sign a purchase agreement with higher payments. The custom accessories on plaintiff's 1996 truck were not returned to her. Further, plaintiff's 1996 truck was not returned to her. At the time that plaintiff left her 1996 truck for a trade-in, she only owed a total payoff of $12,000. The new lease agreement obligated her for 60 payments of $492.72 per month plus a $12,213 residual payment, for a total of approximately $42,000. The terms of the agreement were not explained to her in Spanish. Plaintiff further alleged that she had been damaged by defendant's false representations as follows: she had been deprived "of the use of any vehicle since April 4, 1997"; she had incurred a legal obligation of almost $42,000; she was being billed by the California Department of Motor Vehicles for failure to "renew tags"; and she had incurred legal expenses. Among other things, plaintiff sought prejudgment interest.

Defendant filed a general denial and asserted as affirmative defenses plaintiff's breach of the contract and failure to state a cause of action. The matter proceeded to judicial arbitration which resulted in an award in favor of plaintiff. Defendant's de novo trial request was granted.

A jury trial began on September 7, 1999.[2] The trial was bifurcated on the issues of liability and punitive damages. Defendant stipulated that it violated the act by failing to give plaintiff a copy of the lease agreement in Spanish and to execute the contract. Defendant also stipulated that plaintiff was entitled to rescind the contract.

At the trial, plaintiff testified that she was born in Mexico and Spanish was her primary language. Although she lived in the United States for about 21 years, she has not

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[2] Prior to the trial, the court granted plaintiff leave to amend the complaint to add causes of action for negligent and intentional infliction of emotional distress. However, at the conclusion of the trial, the court granted a directed verdict on both the emotional distress claims.

learned to speak English with any fluency and knew only a few words. She owned a business that manufactured mattresses. On April 7, 1996, she purchased a 1996 pickup truck from defendant. The 1996 purchase was made pursuant to a contract that was negotiated in Spanish. Defendant also provided her with a copy of the sales contract which was in Spanish. She put $15,000 down on the truck and her payments were $334.39 per month. By April 4, 1997, plaintiff had made 11 payments, all of which were timely. As of April 4, 1997, the truck had been driven 24,220 miles. Plaintiff accumulated much of the mileage by driving to work and on trips to Mexico and Texas. Plaintiff did not otherwise use the 1996 truck in her business affairs.

On April 4, 1997, plaintiff went to defendant's service area for an oil change on her 1996 truck. A salesperson, Gaspar Sanchez, who spoke Spanish, approached plaintiff and persuaded her to trade in her 1996 pickup for a new 1997 truck. The lease was negotiated by Al Zaragoza. According to Bruce Frederick, a vice-president of defendant, Mr. Zaragoza was employed as a Manager of Finance. Mr. Zaragoza spoke only in Spanish to plaintiff. Mr. Zaragoza gave plaintiff papers to sign which were in English. One of the documents was purportedly a lease. Plaintiff thought the effect of the document was to allow her to purchase the 1997 pickup. Mr. Zaragoza did not tell her she was signing a lease. He told her she was signing a personal contract and "buying a truck." He told her the payments for the 1997 truck would be about the same as they were for the 1996 pickup.

As part of the transaction, plaintiff traded in her 1996 pickup. In 1996, she had agreed to pay $1,200 for a service contract on the 1996 truck. The service contract was still in effect on April 4, 1997. She had purchased over $4,000 in accessories for the 1996 truck. She was assured that the service contract and accessories would be transferred and added to her new 1997 pickup. The accessories were to be available "in about two or three days . . . ." After signing what she believed was a purchase agreement, plaintiff drove away in the new 1997 truck. About three days later, she called Mr. Zaragoza a number of times about picking up the accessories. In one telephone call, Mr. Zaragoza asked her to sign a "new contract." Umbaldo Polo, who was defendant's general manager telephoned plaintiff and asked her to sign a new contract. Plaintiff refused to do so but made an appointment to

see Mr. Zaragoza. Sometime around April 30, plaintiff met Mr. Zaragoza at defendant's dealership. During this meeting, Mr. Zaragoza told plaintiff that she had signed a lease for the 1997 truck. Mr. Zaragoza stated plaintiff would have to pay a residual of $12,213 at the end of the lease term. Plaintiff refused to sign the document proffered by Mr. Zaragoza and asked that her 1996 truck be returned. Mr. Zaragoza said, if plaintiff did not sign the new agreement, they would take both the 1996 and the 1997 trucks. Mr. Zaragoza stated, '"[I]f you don't sign a new contract, we are going to take both trucks away.'"

Someone telephoned plaintiff's place of business. Plaintiff's sister-in-law, Graciela Castone answered the telephone. The person did not identify himself but asked if plaintiff worked there. Ms. Castone stated that plaintiff did not work there. This was because plaintiff owned the business and did not merely "work" there.

Sometime after that, Mr. Polo telephoned plaintiff. Mr. Polo accused plaintiff of being a "liar." He apparently believed that Ms. Castone, who had initially answered the telephone, was plaintiff. Mr. Polo said: '"I taped you. I just called and you were there.'" Plaintiff responded: "'I was not here. I am here now, and I am answering you.'" Plaintiff told Mr. Polo that she owned the mattress factory and worked there also. She never told any employee of defendant's that she did not work at or own the mattress factory.

Plaintiff put the new truck in her garage so that it would not accumulate any more mileage. On or about May 2, 1997, although plaintiff had not failed to make any payments under the terms of the April 4, 1997, contract, defendant repossessed the 1997 truck. The truck was repossessed at 5 a.m. in the morning. Plaintiff pulled the truck out of her garage and gave the keys to a man who told her that defendant would return her 1996 pickup. However, when plaintiff, accompanied by a daughter, went to defendant's dealership later that day, the 1996 truck was not returned. Mr. Zaragoza told plaintiff that he had orders from the owner not to return either pickup to her. At that time, plaintiff owed no money to defendant.

Bruce Frederick, defendant's vice-president and the chief financial officer, testified he gave the final ratification of the "lease" before it was sent to the finance institutions. A salesperson or finance officer did not need Mr. Frederick's approval to sign a lease binding

defendant. A salesperson or finance officer had the authority to negotiate the terms of the lease with the customer. In April 1997, Mr. Zaragoza was a finance manager. Mr. Zaragoza dealt with Spanish-speaking customers. Mr. Frederick knew that the law required that contracts be provided in Spanish for such customers. Mr. Frederick also knew the definition of contract included a lease. The document signed by plaintiff on April 4, 1997, was a conditional sales purchase, not a lease. Defendant used the conditional sales purchase document to "lease" the 1997 truck.

Plaintiff hired an attorney who wrote a letter of rescission to defendant. The rescission letter stated that plaintiff had not negotiated a lease but the purchase of a 1997 truck. Mr. Frederick testified that he received the letter and gave it to Mr. Polo and defendant's attorney. Defendant did not return plaintiff's 1996 pickup or otherwise compensate her. Defendant never returned the accessories on the 1996 truck to her. Mr. Frederick admitted that at the time plaintiff demanded the return of the 1996 pickup, defendant had the ability to do so. Defendant had paid off plaintiff's loan from Union Bank on the 1996 truck on May 19, 1997, which was two weeks after defendant received plaintiff's notice of rescission.

On June 15, 1997, defendant sold the 1996 pickup to a third party for $22,652.50. However, defendant subsequently received a notice from the DMV that registration fees were due. This was because plaintiff had, on Mr. Zaragoza's advice, stopped payment on a check to pay the registration on the 1996 pickup. Plaintiff had mailed the check prior to going to defendant's dealership to have her 1996 truck serviced on April 4, 1997. The registration fees were for April 30, 1997, through April 30, 1998. In October 1997, after the DMV notified defendant that the registration fees were due, Mr. Frederick authorized the filing of a small claims action against plaintiff to collect the past due fees and penalties. Plaintiff paid the judgment that was entered against her in the small claims action. In other words, plaintiff had to pay defendant the registration fee for a time period during which she *never* had possession of the 1996 truck.

By special verdict, the jury found that defendant was liable to plaintiff for $4,567.87 for conversion of accessories on the 1996 truck. The jury also found defendant liable to

plaintiff for $18,854 for loss of use of the 1996 truck and accessories. The jury was also instructed that the value of the 1996 converted truck was $8,585.68. But as will be noted, the jury never assessed damages based on the value of the 1996 pickup at the time of the conversion. In the punitive damage portion of the trial, the jury found plaintiff was entitled to $62,143.70.

Plaintiff sought costs in the amount of $44,266.74, including $38,962 in attorney fees. Defendant filed a motion to tax costs in which it objected to $19,443.50 in attorney fees for the trial. Defendant claimed the fees were not recoverable for the claims pursued at trial because plaintiff elected to sue for and recover tort damages rather than proceeding under the act. The trial court denied the motion to tax costs regarding the attorney fees.

On December 7, 1999, defendant filed a new trial motion on various grounds including that the award for loss of use and related conversion damages was excessive. Plaintiff opposed the new trial motion. On December 22, 1999, the trial court granted the new trial motion solely on the issue of loss of use damages for conversion unless plaintiff accepted a remittitur in the amount of $12,600.

On January 13, 2000, the trial court entered judgment in favor of plaintiff. On January 18, 2000, defendant filed a notice of appeal. On January 26, 2000, defendant filed a motion to amend the judgment to reflect the trial court's rulings on the remittitur and prejudgment interest issues. On February 15, 2000, the trial court issued an amended judgment which reflected the remittitur for loss of use and other damages of $12,600 and that plaintiff had been awarded her attorney fees plus prejudgment interest.

III. DISCUSSION

[Parts III.A through the heading of part III.E are deleted from publication. See *post* at page 22 where publication is to resume.]

A. The Punitive Damages Award

Defendant contends the punitive damages award must be reversed for two reasons. First, defendant argues the punitive damage award was not supported by sufficient evidence of misconduct by a managing agent or ratification by an officer or director. Second, defendant argues the trial court erroneously prohibited defendant from presenting evidence to support its defense of the absence of oppression, fraud or malice to counter plaintiff's evidence regarding punitive damages.

1. Sufficiency of the Evidence to Support Punitive Damages

Defendant contends the record lacked any evidence to support the jury's award of punitive damages under section 3294, subdivision (b). Section 3294, subdivision (b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." The Supreme Court has described the purpose of section 3294, subdivision (b) as follows, "The drafters' goals were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages." (*White* v. *Ultramar, Inc.* (1999) 21 Cal.4th 563, 572; see *College Hospital, Inc.* v. *Superior Court* (1994) 8 Cal.4th 704, 712-713; *Weeks* v. *Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1150-1151.) In *White* v. *Ultramar, Inc.*, *supra*, 21 Cal.4th at page 573, the Supreme Court explained, "[T]he Legislature intended . . . to limit corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy."

The gist of defendant's argument is there was insufficient evidence to establish defendant's president, Mr. Polo, or vice-president, Mr. Frederick, ratified the conduct of Mr. Zaragoza, the finance manager, who was not a "managing agent" within the meaning of section 3294, subdivision (b). We examine the record for substantial evidence. (*Bickel* v. *City of Piedmont* (1997) 16 Cal.4th 1040, 1053, abrogated with regard to its construction of the Permit Streamlining Act (Stats. 1998, ch. 283, § 51) citing *Crawford* v. *Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; accord, *Gray* v. *Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503.) All evidence must be viewed in the light most favorable to the judgment below and conflicts in evidence must be resolved in favor of upholding the judgment. (*Bickel* v. *City of Piedmont*, *supra*, 16 Cal.4th at p. 1053; *Jessup Farms* v. *Baldwin* (1983) 33 Cal.3d 639, 660.)

However, there was substantial evidence to support the exemplary damages award. Mr. Polo and Mr. Frederick actively took part in conduct which far exceeded the simple misrepresentation of Mr. Zaragoza regarding the lease agreement. Mr. Polo, the president and general manager, and Mr. Frederick, a vice-president and chief financial officer, took active roles in repossessing the 1997 truck and, thereafter, converting the 1996 truck to defendant's use. Mr. Zaragoza testified that, after defendant repossessed the 1997 GMC 1500 pickup, the decision to refuse to return the 1996 truck to plaintiff was the owner's decision. On the same day that defendant repossessed the 1997 truck, plaintiff's attorney wrote a letter of rescission to defendant and demanded the return of the 1996 truck. The letter was received by Mr. Frederick who gave it to Mr. Polo and defendant's attorney. Mr. Frederick also testified that, in October 1997, he authorized the filing of the small claims action against plaintiff for the Department of Motor Vehicles fees owed on the 1996 truck. The Department of Motor Vehicles fees were due for April 30, 1997 through April 30, 1998. At the time the small claims action was commenced, defendant had possessed the 1996 truck since April 4, 1997, when plaintiff released it as part of the trade-in. Mr. Polo also testified that he had made the decision not to return the 1996 truck to plaintiff. Moreover, by October 1997, four months had elapsed since defendant sold the 1996 truck to a third party. The decisions not to return the 1996 truck to plaintiff, which was made by

the owner and the authorization to determine that a legal action should be filed are consistent with persons who are engaged in policymaking for defendant. Viewing the evidence in favor of the jury verdict, plaintiff's evidence established that these employees exercised substantial discretionary authority over defendant's business operations sufficient to permit the imposition of punitive damages. (*White* v. *Ultramar, Inc.*, *supra*, 21 Cal.4th at p. 577; *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 167.) By contrast, defendant presented no evidence that its owner, president and vice-president did not have authority to make policy decisions. Because there was sufficient evidence that defendant's officers and managing agents, "the group whose intentions guide corporate conduct" (*Cruz* v. *HomeBase, supra*, 83 Cal.App.4th at p. 167), acted with oppression, fraud, or malice, defendant cannot prevail on this issue.

2. The Exclusion of Evidence

Defendant also cannot prevail on its theory that the judgment must be reversed because the trial court erroneously excluded evidence by which it sought to establish a defense to the punitive damages claim. Defendant's apparent theory was that plaintiff attempted to sabotage the contract by indicating to a representative of GMAC that she was not employed at the mattress factory. Defendant also argued that, in spite of its stipulation that plaintiff was entitled to rescind the 1997 contract, and it had converted the 1996 truck, it was entitled to present evidence of Mr. Polo's subjective belief in defendant's right to retain possession of the GMAC Sierra.

No abuse of discretion occurred. In a pretrial hearing and during the trial, the court excluded evidence as to what had occurred with regard to a GMAC telephone call. The basis of the ruling was that defendant had not identified an employee of GMAC as a witness in interrogatory responses. There was no abuse of the court's discretion in this regard. (Code Civ. Proc., § 2023; *R. S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1544.)

Likewise, the trial court acted well within its discretion to exclude evidence on the GMAC issue when the matter was raised during the trial. Defendant was allowed to question plaintiff on the issue of the GMAC telephone call to her place of business in front of the jury. In apparent confusion, plaintiff initially testified that she had spoken to someone from GMAC, meaning Mr. Polo. In an Evidence Code section 402 hearing, however, plaintiff testified that she never actually spoke to anyone from GMAC. Rather, plaintiff's sister-in-law spoke to someone from GMAC. Based on this testimony, the trial court barred any attempts to solicit further evidence on the GMAC issue. This was because plaintiff never actually spoke to anyone from GMAC. Accordingly, the sister-in-law was the appropriate person to question in this regard. The following was the state of the record. The GMAC witness could not testify because of the failure to identify the person in interrogatory answers. The alleged GMAC witness was not named in defendant's witness list. Plaintiff never spoke to an employee of GMAC as distinguished from defendants. The trial court did not err in refusing to allow defendant to develop this theory further. (Evid. Code, §§ 352, 702, 800; *Heiner* v. *Kmart Corp.* (2000) 84 Cal.App.4th 335, 344.) In any event, the trial court also offered to allow defendant to call Mr. Polo as a rebuttal witness on this issue should defendant choose. Defendant chose not to call Mr. Polo.

Even if the evidence was erroneously excluded, reversal of the judgment would be proper only if defendant met its burden of showing of a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 354; *People* v. *Earp* (1999) 20 Cal.4th 826, 880.) A miscarriage of justice is established by showing that the jury would have reached a result more favorable to the appealing party in the absence of the errors. (*People* v. *Earp*, *supra*, 20 Cal.4th at p. 880; *People* v. *Watson* (1956) 46 Cal.2d 818, 836; *County of Los Angeles* v. *Noble Ins. Co.* (2000) 84 Cal.App.4th 939, 944-945.) Defendant has not met its burden of showing a miscarriage of justice in this case. Defendant was allowed to present evidence to the jury that GMAC was told that plaintiff was not employed at the mattress factory. Mr. Frederick testified that plaintiff made misrepresentations to the lender. Plaintiff also testified that her sister-in-law spoke to someone from GMAC and indicated that plaintiff did not work at the factory. Plaintiff also testified that Mr. Polo accused her of lying about

being employed. Thus, on this record, defendant has not established a result more favorable would have been reached had more evidence on this issue been presented to the jury.

Defendant also cannot prevail on the argument the trial court erroneously excluded evidence of Mr. Polo's good faith belief in defendant's right to repossess the 1997 truck and convert the 1996 pickup. In this regard, there has been no miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 354; *People* v. *Earp*, *supra*, 20 Cal.4th at p. 880.) Here, the jury actually heard substantial testimony from Mr. Frederick on why the 1996 truck was not returned to plaintiff. Mr. Frederick testified that: it had come to defendant's attention that plaintiff made misrepresentations to the financing institution; defendant's employees believed that they had no obligation to return the money or the 1996 truck after the repossession; and that the rescission letter was turned over to Mr. Polo who discussed the issue with the legal department. Thus, the jury was apprised of defendant's "good faith" theory. Thus, it is not reasonably probable that if more evidence had been presented on this issue, a more favorable judgment would be rendered. As the trial judge indicated, even in the face of such a good faith belief, it is difficult to imagine how a car dealership would believe that it had the right to retain *both* the 1996 and the 1997 trucks under the circumstances of this case. The record is undisputed that plaintiff was current on her payments on the 1996 truck for which she had a year earlier made a $15,000 down payment. No payment was owed to defendant for the 1996 truck. In May 1997, when plaintiff decided to rescind the 1997 contract, no payment was due under its terms. Defendant's refusal to return plaintiff's 1996 truck to her under these circumstances constituted the intentional, wrongful act which justified the award of punitive damages. It is not reasonably probable that a more favorable verdict would have been reached had defendant been allowed to further develop its "good faith" theory.

B. Attorney Fees

Defendant claims the trial court erred in awarding approximately $40,000 in attorney fees to plaintiff. Generally, attorney fees are not recoverable as costs unless the

fees are authorized by an statute or agreement. (Code Civ. Proc., § 1021; § 1717; *Reynolds Metals Co.* v. *Alperson* (1979) 25 Cal.3d 124, 127-128.) In this case, plaintiff sought statutory and contractual attorney fees. Plaintiff sought statutory fees pursuant to section 2988.9 which provides in part, "Reasonable attorney's fees and costs shall be awarded to the prevailing party in any action on a lease contract subject to the provisions of this chapter regardless of whether the action is instituted by the lessor, assignee or lessee." Paragraph 25 of the lease agreement provides for recovery of attorney fees by the lessor. Under section 1717[3], subdivision (a) the fees are also recoverable by a lessee who is the prevailing party. In *Reynolds Metals Co.* v. *Alperson, supra,* 25 Cal.3d at page 128 the Supreme Court explained: "Section 1717 was enacted to establish mutuality of remedy where contractual provision makes recovery of attorney's fees available for only one party [citations], and to prevent oppressive use of one-sided attorney's fees provisions. [Citation.]" Plaintiff would have been liable for attorney fees had defendant prevailed pursuant to paragraph 25 of the agreement. Therefore, plaintiff may recover attorney fees now that she has prevailed. (Civ. Code § 1717; *Reynolds Metals Co.* v. *Alperson, supra,* 25 Cal.3d at pp. 127-129.)

Defendant claims the attorney fee award for the jury trial cannot be upheld because: (1) the claims for contractual rights and statutory violations were disposed of prior to trial by defendant's stipulation to liability for rescission and statutory violations; (2) the conversion claim arose from the failure to return the 1996 truck to plaintiff; and (3) the contract in this case did not apply to tort claims arising from the contract. Defendant further argued that any attorney fees related to the punitive damages phase of the trial cannot be recovered because they related to the conversion claim which did not arise out of

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3 Section 1717, subdivision (a) provides in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

the contract. A claim for tort damages cannot provide a basis for an award of attorney fees. (*Stout* v. *Turney* (1978) 22 Cal.3d 718, 730; *Super 7 Motel Associates* v. *Ward* (1993) 16 Cal.App.4th 541, 550.) Thus, under section 1717, a party is only entitled to attorney fees incurred to litigate contract claims. (*Santisas* v. *Goodin* (1998) 17 Cal.4th 599, 615; *Reynolds Metals Co.* v. *Alperson, supra,* 25 Cal.3d at pp. 129-130.)

Although the fees may not be recoverable under section 1717, the lease agreement provides another basis for the award in that it contains provisions which if construed broadly enough provide for attorney fees under the facts of this case for tort and contractual remedies. (*Santisas* v. *Goodin, supra,* 17 Cal.4th at pp. 607-608; 622-623; *Lerner* v. *Ward* (1993) 13 Cal.App.4th 155, 159.) During the course of the trial both parties asserted theories sounding in tort. Plaintiff asserted that defendant fraudulently induced her to enter into the lease agreement. Defendant asserted as a defense its right to possession of both trucks based in large part on plaintiff's failure to comply with credit obligations under the lease. Defendant theorized that it was entitled to keep the 1996 truck due to plaintiff's misrepresentation concerning her employment. Paragraph 25(a) and (c) of the lease defines a default under the terms of the lease and provides that the lessor is entitled to attorney fees for such a default. A default is defined by paragraph 25 to include "a material misrepresentation" and the breach of "any . . . other agreements in this Lease . . . ." Paragraph 30 of the lease agreement further provides in part: "You will also owe us any unpaid fees and taxes and any amounts due because you have broken agreements in this Lease. These amounts include: . . . (5) any repossession and storage expenses and attorney's fees described in Item 25(c)." Thus, defendant continued to make the issue of its right to retain possession of the converted truck an issue based on the lease agreement throughout the trial. Had defendant prevailed on this theory, it could have sought attorney fees under the broad terms of this contract which includes claims sounding in tort and in contract. (*Santisas* v. *Goodin, supra,* 17 Cal.4th at pp. 607-608, 622-623; *Lerner* v. *Ward, supra,* 13 Cal.App.4th at pp. 160-161; *Xuereb* v. *Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1341.) The contract must be interpreted to include a corresponding right for plaintiff to recover attorney fees concerning misrepresentations made to induce her to

enter into the agreement. Such a claim which arose out of the lease would entitle plaintiff to attorney fees for fraud arising out of the agreement. (*Lerner* v. *Ward*, *supra*, 13 Cal.App.4th at pp. 159-161; *Xuereb* v. *Marcus & Millichap, Inc.*, *supra*, 3 Cal.App.4th at pp. 1342-1343; *Skyway Aviation, Inc.* v. *Troyer* (1983) 147 Cal.App.3d 604, 610-611.)

Likewise, defendant cannot prevail on its argument that attorney fees for the punitive damages portion of the trial. At trial, plaintiff argued and the jury concluded that defendant had fraudulently induced plaintiff to enter into the contract. Although punitive damages may not be awarded for actions related to a contract, punitive damages are recoverable for fraudulent inducement to enter an agreement. (*Walker* v. *Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 996; *Glendale Fed. Sav. & Loan Assn.* v. *Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 135.) It follows that the attorney fees incurred to litigate the punitive damages portion of the trial, which were based in part on a claim of fraudulent inducement are also recoverable. (See *Johnson* v. *Siegel* (2000) 84 Cal.App.4th 1087, 1101-1102; *Palmer* v. *Shawback* (1993) 17 Cal.App.4th 296, 300; *Lerner* v. *Ward*, *supra*, 13 Cal.App.4th at pp. 160-161; *Xuereb* v. *Marcus & Millichap, Inc.*, *supra*, 3 Cal.App.4th at pp. 1343-1345.) Accordingly, the trial court did not err in awarding attorney fees to plaintiff who prevailed on fraud claims which arose out the lease agreement.

Furthermore, contrary to defendant's assertions otherwise, the statutory and contractual claims were not disposed of by defendant's limited admission of liability prior to trial. The issues related to the conversion and fraud claims were inextricably intertwined with the contractual issues. The Supreme Court has held, "Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." (*Reynolds Metals Co.* v. *Alperson*, *supra*, 25 Cal.3d at pp. 129-130; see also *Santisas* v. *Goodin*, *supra*, 17 Cal.4th at p. 623, fn. 10.) Here, the trial consisted of issues common to claims for which the fees are proper and also for which they would ordinarily not be allowed. However, plaintiff sought rescission of the lease agreement and damages for fraud in the inducement. Defendant also obtained possession of the 1996 truck as a result of a contractual agreement to trade it in as part of the lease agreement. Although plaintiff rescinded the lease

agreement in May 1997, defendant refused to return possession of the 1996 truck. As noted above, defendant's theory was that it was entitled to retain possession of the 1996 truck because plaintiff misrepresented her employment. Defendant continued to assert a right to possess the vehicle based on the lease agreement at trial. As a result, the contractual and statutory violations were not disposed of before trial. Under such circumstances, the trial court could properly award attorney fees for the entire trial.[4]

C. The Statutory Penalty

Defendant also claims the trial court erred in awarding a statutory penalty of $1,000 under section 2988.5 which provides: "(a) Except as otherwise provided by this section, any lessor who fails to comply with any requirement imposed under Section 2985.8 or 2988 for which no specific relief is provided with respect to any person shall be liable to such person in an amount equal to the sum of: [¶] (1) Any actual damages sustained by such person as a result of the failure. . . . [¶] (3) The costs of the action, together with a reasonable attorney's fee as determined by the court. . . [¶] (d) A lessor may not be held liable in any action brought under this section for a violation of this chapter if the lessor shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error. . . ."

Defendant admits that it violated section 2985.8. Defendant agrees it did not sign the lease nor provide plaintiff with a copy. However, defendant claims that a statutory penalty was inappropriate under section 2988.5, subdivision (d) because there was no evidence defendant's conduct was intentional and not a bona fide error in that the documents provided by GMAC did not contain a provision for the signature of the lessor.

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[4] Plaintiff has requested and is entitled to attorney fees for defense of the appeal. (*Morcos* v. *Board of Retirement* (1990) 51 Cal.3d 924, 927; *Del Cerro Mobile Estates* v. *Proffer* (2001) 87 Cal.App.4th 943, 951; *Harbour Landing-Dolfann, Ltd.* v. *Anderson* (1996) 48 Cal.App.4th 260, 263.)

We disagree with defendant's implicit argument that it can escape liability for supplying documents to plaintiff which did not comply with California law. Defendant is a commercial entity conducting business in the State of California. Accordingly, as noted above, it cannot prevail on any claim that it was ignorant of California's consumer protection statutes. (*Hale* v. *Morgan* (1978) 22 Cal.3d 388, 396; *People* v. *Honig* (1996) 48 Cal.App.4th 289, 337.) In any event, there is substantial evidence to support the conclusion that there was no bona fide error.

D. The Election of Remedies

Defendant contends that pursuant to section 2988.7[5] plaintiff's recovery for violation of section 2985.8 is limited to the specific relief sought which was rescission. Accordingly, defendant contends that plaintiff elected rescission and was not entitled to a statutory penalty as well. The facts establish otherwise. By letter in May 1997, plaintiff elected to rescind the lease agreement, a part of which included plaintiff's trade-in of the 1996 truck. Plaintiff was not barred from pursuing the statutory penalty because the rescission remedy was inadequate due to defendant's conduct in converting the 1996 truck. (See *Montgomery* v. *McLaury* (1904) 143 Cal. 83, 88; *Stevens* v. *Curtis* (1953) 122 Cal.App.2d 30, 35; *Karapetian* v. *Carolan* (1948) 83 Cal.App.2d 344, 352-353.)

Defendant also argues: the trial court erred in awarding plaintiff both contract and tort damages; this is because plaintiff elected to accept the jury verdict in the liability proceedings of the trial and then continued to the punitive damages phase on the fraud and conversion claims; and because the statutory penalty and attorney fees were not part of the tort claims, they should not have been awarded. A plaintiff is entitled to seek both statutory penalties and an award of punitive damages. (*Greenberg* v. *Western Turf Assn* (1903) 140

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5 Section 2988.7 provides: "If the lessor fails to comply with Section 2985.8, as an alternative to an action under Section 2988.5, the lessee may rescind the contract if the failure to comply was willful or if correction will increase the amount of the contract balance, unless the lessor waives the collection of the increased amount."

Cal. 357, 363; *Clauson* v. *Superior Court* (1998) 67 Cal.App.4th 1253, 1256; *Turnbull & Turnbull* v. *ARA Transportation, Inc.* (1990) 219 Cal.App.3d 811, 826.) However, as a general rule, if plaintiff prevails at trial, an election must be made to accept the statutory penalty or the punitive damages award. (*Clauson* v. *Superior Court, supra,* 67 Cal.App.4th at p. 1256; *Turnbull & Turnbull* v. *ARA Transportation, Inc., supra*, 219 Cal.App.3d at pp. 826-827.)

The fact that there was a statutory penalty in this case does not require a reversal. For example, in *Greenberg* v. *Western Turf Assn., supra,* 140 Cal. at pages 363-364, the Supreme Court upheld a punitive damages award under section 3294 and a statutory penalty of $100 in addition to actual damages. The rule is that statutory and punitive damages that arise out of the same cause of action are not mutually exclusive. (*Hassoldt* v. *Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169; *Baker* v. *Ramirez* (1987) 190 Cal.App.3d 1123, 1138; *Marshall* v. *Brown* (1983) 141 Cal.App.3d 408, 418-419.) Thus, where multiple damage awards are authorized, punitive damages may be awarded in a tort action where the necessary malice and oppression is shown even if a statutory penalty is imposed. (*Hassoldt* v. *Patrick Media Group, Inc., supra*, 84 Cal.App.4th at p. 169; *Cyrus v. Haveson* (1976) 65 Cal.App.3d 306, 316-317.) Different social objectives are reflected in multiple damages awards which may or not be characterized as penal. (*Marshall* v. *Brown*, *supra*, 141 Cal.App.3d at p. 419; *Drewry v. Welch* (1965) 236 Cal.App.2d 159, 174.) The rationale in such cases is that there is a distinction between punitive damages which depend on a showing of malice and oppression and a penal provision which is imposed when a "law has been violated and its majesty outraged." (*Greenberg* v. *Western Turf Assn., supra*, 140 Cal. at p. 364; *Hassoldt* v. *Patrick Media Group, Inc., supra,* 84 Cal.App.4th at p. 169; *Marshall* v. *Brown*, *supra*, 141 Cal.App.3d at pp. 418-419.) However, an election is required when the statutory penalty is doubled or trebled because the statute is then deemed penal in nature. (*Hassoldt* v. *Patrick Media Group, Inc., supra*, 84 Cal.App.4th at p. 169; *Baker* v. *Ramirez, supra,* 190 Cal.App.3d at pp. 1138-1139; *Marshall* v. *Brown*, *supra,* 141 Cal.App.3d at p. 419.) As the Court of Appeal in *Baker* v. *Ramirez, supra,* 190 Cal.App.3d at pages 1138-1139, noted: "However, due to the penal

nature of these provisions, the damages should be neither doubled nor tripled . . . if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 . . . ." In this case, upholding the statutory penalty would not sanction a double recovery. The statutory penalty in section 2988.5 may not be doubled or trebled. It is also limited to $1000. Accordingly, the statute is in the nature of a multiple damage award rather than a punishment. It does not have the same objectives as a punitive damage award under section 3294. Accordingly, the trial court did not err in awarding both the statutory penalty and punitive damages.

E. Prejudgment Interest

[The balance of the opinion is to be published.]

Defendant contends plaintiff may not receive prejudgment interest on her loss of use claim. Citing *Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 624-625, defendant argues: "[I]t is clear from the jury verdict, awarding loss of use damages on plaintiff's conversion claim, that plaintiff has already been compensated for prejudgment interest, and, and in accepting that award, has elected the tort remedy. 'In the absence of special circumstances the appropriate measure of damages for conversion of personal property is the fair market value of that property plus interest from the date of conversion, the standard first listed in [section 3336]. However, where proof establishes an injury beyond that which would be adequately compensated by the value of the property and interest, the court may award such amounts as will indemnify for all proximate reasonable loss caused by the wrongful act. [Citation.] Where damages for loss of use exceed the legal rate of interest, it is appropriate to award the former, but not both.'"

Defendant's argument as applied to this case is without merit. The measure of damages for conversion is set forth in section 3336 which states in its entirety: "The detriment caused by the wrongful conversion of personal property is presumed to be: [¶] First—The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the

natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and [¶] Second—A fair compensation for the time and money properly expended in pursuit of the property." The damage measures set forth in the first paragraph of section 3336 are in the alternative. The first alternative is to compensate for the value of the property at the time of conversion with interest from the time of the taking. The second alternative is compensation in a sum equal to the amount of loss legally caused by the conversion and which could have been avoided with a proper degree of prudence. (*Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 215; *Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116.) Both of these alternatives are in addition to the damage element for the time spent pursuing the converted property set forth in the second paragraph of section 3336.

The jury was instructed on both alternative damage theories. The jury was instructed in the language of section 3336 as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: [¶] First--The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and [¶] Second--A fair compensation for the time and money properly expended in pursuit of the property." Despite the fact that both alternatives were submitted to the jury, the only special verdict on the damage issue asked this question, "What amount of damages did plaintiff suffer, if any, for the loss of use of her 1996 [pickup] truck and accessories?" In other words, the sole issue presented to the jury related to the "loss of use" of the 1996 pickup truck. The jury was never asked to determine the value of the 1996 pickup at the time of the conversion. The jury awarded plaintiff $18,854 for loss of use of her pickup truck. As noted previously, in response to the new trial motion, the court reduced the amount of loss of use damages. The trial court stated: "A motion for new trial on loss of use only is granted unless the plaintiff accepts a remittitur of $12,600. That is loss of use plus the small claims judgment of $4,254 allowed by the court." The conversion damages were not for the value of the 1996 pickup truck; the first alternative in

section 3336. Rather, the damages were for loss of use and the $4,254 small claims judgment which falls under the second alternative in the first paragraph of section 3336.

The issue then is whether prejudgment interest may be recovered for loss of use and other damages in a conversion action. We conclude prejudgment interest may be recovered under these circumstances. The pertinent language is in section 3287, subdivision (a) which states, "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him on a particular day, is entitled also to recover interest thereon from that day." Defendant raises no questions as to whether the damages were capable of being made certain by calculation and the right to recover vested on a particular day. Defendant does not dispute that these elements of section 3287, subdivision (a) were satisfied. Rather, defendant's *sole* contention is that conversion damages for loss of use and the small claims judgment under the second alternative in the first paragraph of section 3336 are never subject to prejudgment interest. In this case, where the sole basis for the damage award was the second alternative in the first paragraph of section 3336, the express language of section 3287, subdivision (a) can allow for the awarding of prejudgment interest.

We recognize the decision relied upon by defendant, *Lint v. Chisholm, supra*, 121 Cal.App.3d at page 625, holds: "Where damages for loss of use exceed the legal rate of interest, it is appropriate to award the former, but not both. [Citation.]" However, the express language of section 3287, subdivision (a) permits the recovery of prejudgment interest under specified circumstances. Defendant does not quarrel with the trial court's implied finding that those specified circumstances in section 3287, subdivision (a) are present in this case. There is no evidence of an inequitable double recovery in this case for other injustice. This is not a case where a plaintiff has received an award of interest under the initial alternative in the first paragraph of section 3336. Such a scenario could posit issues of an inappropriate double recovery. Rather, in this case, plaintiff was compensated for damages under the second alternative in the first paragraph of section 3336 which does not include an element of interest. Hence, given the express language of section 3287,

subdivision (a), we respectfully disagree with *Lint* and affirm the award of prejudgment interest in this case.

IV. DISPOSITION

The judgment is affirmed. Plaintiff, Carmen Moreno, is entitled to costs on appeal including attorney fees from defendant, Greenwood Auto Center.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P.J.

We concur:

ARMSTRONG, J.

WILLHITE, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.